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George L. Clarke

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MUNICIPAL RESPONSIBILITY IN TORT IN MARYLAND

By GEORGE L. CLARKE*

In this era of increasing governmental participation in so many of the innumerable activities that constitute present-day life, of greater social consciousness and humanitarian trends (at least in this country), it is somewhat startling to realize that the maxim "the King can do no wrong" may still be invoked to prevent redress to one who has suffered a civil wrong at the hands of an agent, officer, or employee of a municipality. Legal writers everywhere have sensed the anomaly involved and, almost uniformly, have levelled shafts of criticism at the existing situation.¹ Each analysis and subsequent complaint recognizes the omnipotence of *stare decisis* and the cry is for remedial legislation. The purpose of this comment is to present a brief critical view of the subject and the more important aspects of the pertinent Maryland law.

Professor Borchard states:²

"The reason for this long continued and growing injustice in Anglo-American law rests, of course, upon a medieval English theory that 'the King can do no wrong', which without sufficient understanding was introduced with the common law into this country and has survived mainly by reason of its antiquity. . . . The maxim really meant that the King was not *privileged*³ to do wrong. If his acts were against the law they were *injuriae* (wrongs) and a considerable measure of redress was obtainable though not in damages."

One of the earlier English cases which served as precedent for modern authority was *Russell v. Men of Devon*.⁴ In that case the plaintiff sought to recover damages for in-

* Third Year Student, University of Maryland School of Law.

¹ Borchard, *Government Liability in Tort* (1924) 34 Yale L. J. 1, 129, 229; (1928) 36 Ibid 1, 757, 1039; (1928) 28 Col. L. R. 577, 734; Tooke, *Extension of Municipal Liability in Tort* (1932) 19 Va. L. R. 97; Seasongood, *Municipal Corporations, Objections to the Governmental or Proprietary Test* (1936) 22 Va. L. R. 910; Doddridge, *Distinction Between Governmental and Proprietary Functions of Municipal Corporations* (1925) 23 Mich. L. R. 325; Freedman, *Liability in Tort of Municipal Corporations in Missouri* (1938) 3 Mo. L. R. 275; *Municipal Tort Liability—A Proposal* (1938) 23 Iowa L. R. 392; Note, *Should We Abandon the Distinction Between Governmental and Proprietary Function* (1920) 34 Harv. L. R. 66. For other articles and texts see those listed 20 A. B. A. J. 747, 748 n. i.

² Op. cit. *supra*, note 1, 34 Yale L. J. 1, 2.

³ Italics supplied.

⁴ 2 T. R. 667, 100 Eng. Rep. 359 (K. B. 1788).

juries suffered in consequence of a bridge being out of repair and the attempt was made to charge two of the county inhabitants in behalf of all the rest. The King's Bench held that no civil action lay against the inhabitants of a county for an individual injury in consequence of a breach of their public duty. But, as appears in *County Commissioners of Anne Arundel County v. Duckett*⁵ wherein the Maryland Court quotes Chancellor Kent⁶ in speaking of *Russell v. Men of Devon*, "*The county was not a corporation for that purpose, and had no corporate fund.*" Today, of course, municipalities and county commissioners are incorporated bodies possessing corporate funds, so the injustice which might have resulted had the two defendants in *Russell v. Men of Devon* been charged for all the county inhabitants could no longer occur. Municipal corporations are, nevertheless, still permitted to enjoy the immunity of the sovereign in a large class of tort cases, specifically, "where a municipality is engaged in the performance of a governmental function as an agent of the State, the same principle which protects the state from liability also protects the municipality charged with a tort."⁷

A governmental function (also called "public", "legislative", "judicial") is that type of function, wherein, as indicated, no liability rests upon the municipality, and is to be distinguished from a proprietary function (also called "private", "corporate", "municipal") in the performance of which the city is, as any individual, responsible for its torts. This dual classification of municipal functions serves as a divining rod to determine municipal liability. If the function in the performance of which the injury occurred was governmental, the plaintiff has no remedy against the city; if the function was proprietary he may be compensated. The difficulty rests in the classification of the various functions of the city government, and, as might be expected, the courts of this country labor greatly, and with inconsistent results, to rationalize their findings. "The rules sought to be established in determining whether a given function is governmental or proprietary are as logical as those governing French irregular verbs."⁸

Let us assume, however, that the classification has been made and the injured party learns that he was unfortunate

⁵ 20 Md. 468, 479 (1864).

⁶ *Bartlett v. Crozier*, 17 Johns (N. Y.) 439 (1820).

⁷ *M. and C. C. of Balto. v. State, use of Blueford, et al.*, 173 Md. 267, 195 A. 571, 574 (1937).

⁸ *Seasongood*, op. cit. *supra* note 1.

enough to have been injured in a public park rather than on a public highway, that his injury therefore arose in a function wherein the city was acting in its governmental role, and that, consequently, he cannot recover. What mental anodyne may he take to reconcile himself to his plight? Six reasons are usually given to support the rule of non-liability for injuries occasioned in the course of governmental functions.

1. *"The state is sovereign and the municipality its governmental agency; no suit can be brought against the state without its consent, therefore none against the municipality."*⁹ The Supreme Court, in *Chisholm v. Georgia*,¹⁰ demolished the idea of sovereign immunity, and Mr. Justice Holmes, similarly unimpressed with the royal inability to err as a democratic concept, was led to declare "a sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."¹¹ However correct this view may be as applied to the State, "the subordinate legislative powers of a municipal character which have been or may be lodged in the city corporations—do not make these bodies sovereigns" said the Supreme Court,¹² and the injured party will be inclined to agree.

2. *The municipality derives no profit or monetary return from the performance of a public function, therefore it need not recompense the injured party.*¹³ But the injured party may properly reply that tort liability is not predicated on the wrongdoer's being engaged in a profitable enterprise at the time when the injury occurs.

3. *The orderly and efficient administration of city affairs will be interfered with if the city is held liable for employees' torts.*¹⁴ But, says one writer, "To submit, in

⁹ 34 H. L. R. 66, 67 (1920); see also the Blueford case, *supra* note 7, 574 for language supporting the doctrine of sovereign immunity.

¹⁰ 2 Dallas 419 (1793).

¹¹ *Kawananakoa v. Polyblank*, 205 U. S. 349, 353 (1906).

¹² *Metropolitan Railroad Co. v. D. C.*, 132 U. S. 1, 9 (1889).

¹³ Blueford case, *supra* note 7, 576: "where the act . . . is solely for the public benefit, with no profit or emolument enuring to the municipality . . . and has in it no element of private interest, it is governmental in its nature." See also: *M. and C. C. Balto. v. State*, use of Ahrens, 168 Md. 619, 179 A. 169, 99 A. L. R. 680 (1935); also, *Wallace v. Balto.*, 123 Md. 638, 91 A. 687 (1914).

¹⁴ Blueford case, *supra* note 7; ". . . (to hold the city liable) would so hamper and impede the orderly exercise of its executive and administrative powers as to prevent the proper and adequate performance of its governmental functions." p. 574.

justification of the rule that the immunity is necessary for the proper functioning of the city, is to propound the obvious contradiction that the agency formed to protect society is under no obligation, when acting itself, to protect an individual member of society."¹⁵ Furthermore, the result of imposing responsibility for torts would probably be greater efficiency. We are more likely to err when we know our errors will cost us nothing.

4. *When officers and employees of the municipal government are engaged in the performance of governmental duties they are agents of the State, and not of the city, and respondeat superior is therefore inapplicable.* But the law of agency has it that the fact of agency is determined by considerations of control, employment and dismissal, payment of wages,¹⁶ etc., rather than by the nature or character of the employment. Maryland, nevertheless, and the weight of authority¹⁷ hold that (police officers, for example) "whether appointed by it or not they are not municipal servants or agents—and municipalities for which they are appointed will not be responsible for their acts or omissions. . . ."¹⁸

5. *The property of the city would be sequestered and made subject to judgments obtained against it with the result that the objects for which the city was formed would be frustrated.* But, says Professor Seasongood,¹⁹ "the right to sue is not dependent on whether a judgment . . . may be enforced by execution or at all". Further, "those jurisdictions which allow execution against city property are careful to limit seizure to such as is held in the city's private capacity. There is nothing extraordinary in having judgments regarded as just another expense of the municipal undertaking and provision made for them by a tax levy to set up a judgment or contingent fund."

6. *The act whence the injury arose was done in obedience to a "mandatory" statute; the city was thus behaving as a mere instrumentality of the state, and the sovereign's immunity therefore attached.* On the other hand, where the statute, in the execution of which the wrong occurred, is "permissive" or "discretionary", the city's undertaking in relation thereto subjects the city to the liability of a private person. This view is unsound, it is sub-

¹⁵ Freedman, *op cit.* *supra* note 1, 277.

¹⁶ 2 Mechem, *Law of Agency* (2nd Ed. 1914), Sec. 1863.

¹⁷ 19 R. C. L., Sec. 399.

¹⁸ *Wynkoop v. Hagerstown*, 159 Md. 194, 201, 150 A. 447 (1930).

¹⁹ *Op. cit.* *supra* note 1.

mitted, for where there is an unquestioned duty to be exercised for the community the fact that the performance thereof was "mandatory" rather than voluntarily assumed under a "permissive" statute "has never been the starting point for liability in the law of torts".²⁰

Instances wherein the liability of the municipality is uncontested indicate the fallacies inherent in the reasoning of the Courts to support the rule of non-liability for creation or permitting nuisances,²¹ in contract,²² in admiralty,²³ in trespass.²⁴ The absurdities involved in the classification of municipal functions are apparent in the following: ". . . water (private) is intimately connected with health (public). It is used to sprinkle streets and to flush and clean them (public) and sewers, for fire protection (public), in the cleaning and servicing of schools and municipal universities (public), and other public buildings, in the upkeep of parks (public). . . . How can an activity so pervasive and essential be justly classified as private and non-essential?"²⁵ The question is obviously rhetorical. But many states, including Maryland, have answered that maintaining a waterworks and supplying water for domestic use is a private non-essential function.

Let us now examine the Maryland law.

GOVERNMENTAL FUNCTIONS

Parks

Maryland joins the weight of authority²⁶ in classifying the maintenance and operation of public parks as a governmental function in the case of *Baltimore v. State, Use of Ahrens*,²⁷ which was confirmed in the recently decided *Baltimore v. State, Use of Blueford et al.*²⁸ In the latter case an eleven year old girl drowned in a public swimming pool maintained by the city in Riverside Park. The action was brought on the theory that the guards employed by the

²⁰ 34 H. L. R. 66, 68.

²¹ Taylor v. M. and C. C. Balto., 130 Md. 133, 147, 99 A. 900 (1917). See cases cited in notes 74 and 75 *infra*; also 75 A. L. R. 1196, 1199.

²² 19 R. C. L., p. 1059.

²³ 19 R. C. L., p. 1136.

²⁴ M. & C. of Frostburg v. Hitchins, 99 Md. 617, 59 A. 49, 23 L. R. A. (N. S.) 159, note (1904).

²⁵ Seasongood, op. cit. *supra* note 1, 916.

²⁶ 29 A. L. R. 863; see also: 24 Va. L. R. 430 (1938).

²⁷ 168 Md. 619, 179 A. 169, 99 A. L. R. 680 (1935); in 22 Va. L. R. 97, 98, speaking of the Ahrens case, the writer says it is "an extreme example of outmoded legal reasoning and makes for a result that is socially undesirable. Fortunately, it is contrary to the overwhelming weight of modern authority."

²⁸ *Supra* note 7.

city were negligent in permitting the child to enter the deep water zone and in allowing her to drown when they knew or should have known she was in danger. The Court of Appeals reversed the lower court, which held the city liable, and said, "it is better that the adequate performance of such an act be secured by public prosecution and punishment of officials who violate their duties . . . than to disburse public funds dedicated to the maintenance of such public conveniences as public parks, playgrounds, hospitals, swimming pools, and beaches. . . ." It is submitted that a disbursement of trust funds might well operate to the detriment of an eleemosynary institution but the continued existence of the municipality and of such activities as mentioned by the Court of Appeals could be sustained through exercise of the taxing power.

Schools

In *Gold v. Baltimore*,²⁹ it was held that in maintaining schools the city performed a governmental duty. The infant plaintiff, whose leg was broken by the falling of a school door, was thus denied recovery. School children may therefore be subjected to the dangerous condition of buildings, and the negligence of the city's officers, servants and agents without possibility of recovery from the city. The *Gold Case* cites an earlier Maryland case, *Weddle v. School Commissioners of Frederick County*,³⁰ which held "a quasi corporation or governmental agency, such as a board of school commissioners having charge of the public schools in a county, is not liable to an individual in an action of tort for negligence unless such liability is imposed by Statute." Consequently, in that case, the father of a school girl was denied recovery for the latter's death, which was caused by the child's being knocked down by a single strand of wire strung at a height of four feet between trees on the school grounds. When it is realized that attendance at public schools is virtually compulsory for many Maryland children, the rule of non-liability seems particularly severe.^{30a}

Police and Fire Departments

"The protection of the citizen against pestilence, disease, violence or disorder is essentially a governmental function to be exercised by the state under its police power

²⁹ 137 Md. 335, 112 A. 588, 14 A. L. R. 1389 (1921).

³⁰ 94 Md. 334, 51 A. 289 (1902).

^{30a} Md. Code Supp., Art. 77, Secs. 220, 221.

through proper agents. (The) administration of the criminal laws, the conservation of the public peace, or the protection of the citizen from violence"³¹ is unmistakably a governmental task. Thus, in *Wynkoop v. Hagerstown*,³² the failure of the city police department to prevent an intoxicated person from discharging a fire-arm did not render the city liable to one injured by the discharge, and, even though there was a breach by the police department of a governmental duty, the failure amounted to negligence in the exercise of a governmental function, so there was no recovery for the plaintiff. Although the common law rule, still observed in Maryland, is that a municipal corporation can incur no liability by reason of defaults of its police or fire departments, "an overwhelming opinion throughout the world in favor of the assumption of community liability for torts of public officers may be regarded as representing a growing moral conviction. . . ."³³

Public Buildings

The recently decided *County Commissioners of Harford County v. Love*³⁴ held that one injured by falling from a platform at the bottom of stairs leading to the basement of the county courthouse cannot recover damages from the county, such injury having been received in the use of accommodations gratuitously provided for public convenience in a building maintained by the county for governmental purposes. "The judicial and administrative purposes to which such buildings are devoted necessarily impress them with a governmental character." This view concurs with the weight of authority.³⁵

PROPRIETARY FUNCTIONS

Markets

In *Reed v. Mayor and City Council of Baltimore*,³⁶ the plaintiff tripped over a platform which was lying flat on the cement walkway in front of a stall in Cross Street Market. The lower court granted the city's demurrer prayer. This ruling was reversed on appeal. The Court said the

³¹ *Supra* note 18.

³² *Ibid.*

³³ *Municipal Responsibility for the Torts of Policemen*, 42 Yale L. J. 241, 244 (1932). See also: 19 R. C. L. 1116, 1119; 84 A. L. R. 514, 33 A. L. R. 688, 9 A. L. R. 143.

³⁴ 173 Md. 429, 196 A. 122 (1938).

³⁵ 19 R. C. L., p. 1123; 43 C. J., p. 1160.

³⁶ 171 Md. 115, 188 A. 15 (1936).

city's duty to the public was comparable to that of a department store owner to his customers. As customer-invitees, persons using the market were entitled to the exercise of reasonable care on the part of the proprietor, the city. "... in owning the market and deriving a revenue from its stalls by way of rentals (the city) was acting within its proprietary or private character, and would, therefore, be liable for negligence, assuming that, under similar facts and circumstances, liability would exist as against an individual."³⁷

Removal of Ashes and Household Refuse

In *Consolidated Apartment House Company v. Baltimore*,³⁸ it was argued that the city's relation to the removal of ashes, etc., was so closely akin to matters touching health and fire conditions that the function partook of the latter's governmental character. The Court's holding illustrates the unsatisfactory nature of the governmental-proprietary classification. "... the city has a proprietary interest in its thoroughfares, and while the removal of ashes and household refuse may contribute to the public health, it also bears a close relationship to the obligation of the city to keep its streets and alleys clean and free from obstructions and safe for travel."³⁹ The power and duty to remove ashes and household refuse was therefore held to rest upon the city in its private and corporate capacity.⁴⁰

Streets, Highways, Nuisances

The most profitable source of litigation against the city is for injuries received by persons using the streets and highways, and, although "it is difficult to discover any logical distinction between the governmental character of such a duty as that of maintaining the public highways . . . and that of maintaining public parks,"⁴¹—"There is no question that, by the great weight of authority, the rule of law is that it is a private proprietary obligation of municipal corporations to keep their streets and public ways reasonably safe for travel in the ordinary manner, and

³⁷ 171 Md. 115, 118, 188 A. 15, 16; see also: *Balto. v. Brannon*, 14 Md. 227 (1859).

³⁸ 131 Md. 523, 102 A. 920, L. R. A. 1918 C. 1181 (1917).

³⁹ *Ibid.*, 131 Md. 523, 538.

⁴⁰ It is of interest to note that the declaration in the *Consolidated Apartment House* case, *supra* note 38, was held demurrable because of the absence of averments to show that there was a sufficient fund wherewith the function could be performed.

⁴¹ State, use of Blueford, *supra* note 7.

to prevent and remove a nuisance affecting the use and safety of these public ways. This rule is founded on the principles of agency and torts, and exemplifies the basic conception that everyone, in carrying through an affirmative course of conduct, must, at his peril, act with due care, according to the circumstances".⁴² The duty running to those injured by defects in streets and highways arises from a principle stated, and often repeated by the Court of Appeals, in the leading case of *Baltimore v. Marriott*:⁴³ "When a statute confers a power upon a corporation to be exercised for the public good, the exercise of the power is not merely discretionary but imperative, and the words 'power and authority' in such case may be construed *duty and obligation*." This language is, of course, broad enough to include governmental and proprietary functions, and, if taken literally, would, under the Charter and Public Local Laws of Baltimore City,⁴⁴ for example, place liability on the city for torts occurring in the performance of the functions of the fire department, health department, hospitals, parks, police department, etc., but clearly the quoted statement was only intended to embrace the performance of those functions that were otherwise proprietary.^{44a}

Municipal corporations have been held responsible to persons injured on defective highways,⁴⁵ sidewalks,⁴⁶ bridg-

⁴² *Balto. v. Eagers*, 167 Md. 128, 136, 173 A. 56 (1934).

⁴³ 9 Md. 160, 174 (1856).

⁴⁴ Sec. 6, sub-sections 5, 9, 10, 16, 17. See: *Gutowski v. M. and C. C. of Balto.*, 127 Md. 502, 508, 96 A. 630 (1916), where the court says: "but in every instance in which the liability referred to has been enforced by this court, the default or neglect related to a duty or undertaking in reference to which the municipality had a proprietary or participating interest."

^{44a} It is interesting to note that Maryland does not subscribe to the "mandatory or permissive statute" rationale suggested *supra* note 20 as a reason for excusing liability. The *mandatory* interpretation required by the Court of Appeals is held to create rather than destroy liability.

⁴⁵ Since Md. Code Supp., Art. 25, Sec. 1 declares the County Commissioners of each county to be a corporation, charged with the care of roads, etc., and empowered to tax to provide therefor, such bodies are treated as municipal corporations. *County Comm'rs of Anne Arundel County v. Duckett*, 20 Md. 468 (1864) (horse killed because of bad state of repair of road); *County Comm'rs of Allegany County v. Broadwaters*, 69 Md. 533, 16 A. 223 (1888) (plaintiff fell off side of road where there was a precipice, no railing being there to prevent such accident); *Tyson v. Baltimore County*, 23 Md. 510 (1868) (a wall was built to protect road from water from a dam; plaintiff suffered consequential damages; *held, damnum absque injuria*); *Walter v. County Comm'rs of Wicomico County*, 35 Md. 385, 394 (1872) (obstructions erected in highway caused consequential injury to plaintiff's mills and dam from backwater); *County Comm'rs Anne Arundel Co. v. Duvall*, 54 Md. 350, 355 (1880) (laborers cut tree to be used in road repairs which fell on plaintiff passing in road); *Baltimore County v. Wilson*, 97 Md. 207, 54 A. 71, 56 A. 596 (1903) (County Commissioners not liable for injuries from defective highway after statute deprived them

es,⁴⁷ and footways.⁴⁸ In such actions the usual principles of tort liability are applicable. The municipality's liability is not that of an insurer, nor is it responsible for every unevenness or roughness, but its duty is to maintain the streets and highways in a reasonably safe condition.⁴⁹ This duty is non-delegable and cannot be avoided by em-

of control of road); *Charles County v. Mandanyohl*, 93 Md. 150, 48 A. 1058 (1901) (plaintiffs vehicle wheel went in deep hole and plaintiff was injured by stepping therein); *Howard County v. Pindell*, 119 Md. 69, 85 A. 1041 (1912) (hole in highway); *Richardson v. Comm'rs Kent County*, 120 Md. 153, 87 A. 747 (1913) (although Road Engineer not appointed by the Commissioners, latter held responsible for his negligence, such engineer being, to some extent, under their control); *City of Baltimore v. Leonard*, 129 Md. 621, 99 A. 891 (1917) (stake, driven in roadway by contractor employed by city, caught plaintiff's dress causing her to fall); *State, use of Biggs, v. Balto.*, 129 Md. 686, 99 A. 860 (1917) (City must erect barriers or railings at dangerous places); *M. and C. C. of Balto. v. Bassett*, 132 Md. 427, 104 A. 39 (1918) (hole in macadamized highway); *County Comm'rs of Kent County v. Pardee*, 15 Md. 68, 134 A. 33 (1926) (jolt caused by hole in road near bridge caused steering mechanism to lock and car plunged off bridge); *Harford County v. House*, 106 Md. 439, 67 A. 273 (1907) (horse fell in hole in road); *Hagerstown v. Hertzler*, 167 Md. 518, 175 A. 447 (1934) (guy wire over grass strip between pavement and curb caused fall).

⁴⁶ *Vannort v. Comm'rs of Chestertown*, 132 Md. 685, 104 A. 113 (1918); *Balto. v. Walter*, 98 Md. 637, 57 A. 4 (1904); *Keen v. Havre de Grace*, 93 Md. 34, 48 A. 444 (1901); *Cordish v. Bloom*, 138 Md. 81, 113 A. 578 (1921).

⁴⁷ *County Comm'rs Pr. Geo.'s County v. Burgess*, 61 Md. 29 (1883); *Adams v. County Comm'rs Somerset County*, 106 Md. 197, 66 A. 695 (1907); *County Comm'rs Garrett County v. Blackburn*, 105 Md. 226, 66 A. 31 (1907); *County Comm'rs Balto. County v. Baker*, 44 Md. 1 (1875); *Eyler v. County Comm'rs Allegany County*, 49 Md. 257 (1878); *Charles v. M. and C. C. Balto.*, 138 Md. 523, 114 A. 565 (1921); *Bembe v. County Comm'rs Anne Arundel County*, 94 Md. 321, 51 A. 179 (1902).

⁴⁸ *M. and C. C. of Balto. v. Eagers*, 167 Md. 128, 173 A. 56 (1934). In this case the city authorities had a tree removed from a public square. The tree was twenty feet from a walk used by pedestrians. The court held that even though the utility and beauty of the square were increased by such removal, that the safety of streets and footpaths required paramount care on the part of the city and it was held liable for the death of one upon whom a large limb of the tree had fallen. See also: *Balto. v. Burke*, 127 Md. 554, 96 A. 693 (1916) (approach to markets must be kept in safe condition). Another case which, like the *Eagers* case *supra*, shows the overlapping between governmental and proprietary functions is *Birchhead v. M. and C. C. Balto.*, 197 A. 615 (Md. 1937). Municipal non-liability was urged here because the construction and maintenance of *highways* through *parks* was said to be a governmental function. The court was not required to express an opinion on this point, but it is submitted that the use of the park highways is to such a large extent for ordinary transportation between points outside the park rather than for recreational purposes, that the regular rule of liability for care of the highways should be applicable.

⁴⁹ *Cordish v. Bloom*, 138 Md. 81, 85, 113 A. 578 (1921): "it cannot be held responsible for every depression, difference in grade, or unevenness in sidewalks . . . without burdening the property owners with unreasonable and unnecessary taxation." See also: *Magaha v. Hagerstown*, 95 Md. 62, 76, 51 A. 837, 93 Am. St. R. 317 (1902); *Lynch v. Balto.*, 169 Md. 623, 182 A. 582 (1936); *Balto. v. Thompson*, 171 Md. 460, 189 A. 822 (1936); *County Comm'rs Anne Arundel County v. Vanskiver*, 166 Md. 481, 171 A. 705 (1934).

ploying an independent contractor;⁵⁰ nor does the fact that the obstruction was placed thereon by a third person absolve the city's liability.⁵¹ The municipality's responsibility is restricted by the necessity of notice: "Before . . . the municipality can be made liable in any case, it must be shown that it had actual or constructive notice of the bad condition of the streets."⁵² It is not, however, necessary to allege in the declaration notice on the part of the city as to the defective condition.⁵³ Before any liability whatsoever may be asserted against the city an express or implied acceptance of the dedication of the street must be shown.⁵⁴ The plaintiff must not be guilty of contributory negligence.⁵⁵ He may be justified in assuming that it is reasonably safe for travel, but must use ordinary prudence to discover such defects or obstructions as might cause injury.⁵⁶ The city must anticipate possible injuries to pedestrians from building operations carried on near the street and must pass regulations and enforce them in order to claim full performance of its duty as against a

⁵⁰ *M. and C. C. Balto. v. Leonard*, 129 Md. 621, 625, 99 A. 891, (1917): "a corporation on whom positive duties are imposed by law cannot avoid liability for injuries resulting from failure to perform such duties by employing a contractor for the purpose; nor in such case is the fact that the injuries resulted from the contractor's negligence a defense." See also: *Thillman v. M. and C. C. Balto.*, 111 Md. 131, 73 A. 722 (1909); *Hanrahan v. Balto.*, 114 Md. 517, 80 A. 312 (1911); *Balto. v. O'Donnell*, 53 Md. 110 (1879).

⁵¹ *Havre de Grace v. Fletcher*, 112 Md. 562, 77 A. 114 (1910).

⁵² *Annapolis v. Stallings*, 125 Md. 343, 346, 93 A. 974 (1915); *Comm'r's Howard County v. Pindell*, 119 Md. 69, 85 A. 1041 (1912); *Harford County v. Hause*, 106 Md. 439, 67 A. 273 (1907); *Comm'r's Delmar v. Venables*, 125 Md. 471, 476, 94 A. 89 (1915): "After a street has been out of repair so that the defect has become known and notorious to those traveling the street, and there has been full opportunity for the municipality through its agents charged with that duty, to learn of its existence and repair it, the law imputes to it notice and charges it with negligence." *Comm'r's of Balto. County v. Collins*, 158 Md. 335, 148 A. 242 (1930); *Citizens Savings Bank v. Covington*, 199 A. 849 (Md. 1938); *M. and C. C. of Balto. v. Walker*, 98 Md. 637, 57 A. 4 (1904) (the city is not entitled to notice where the obstruction was placed in the street by itself); *Guest v. Church Hill*, 90 Md. 689, 695, 45 A. 882 (1900); *Hitchins v. Frostburg*, 68 Md. 100, 11 A. 826 (1887); *Keen v. Havre de Grace*, 93 Md. 34, 48 A. 444 (1901); *Long v. B. F. Sweeten & Son*, 123 Md. 88, 90 A. 782 (1914) (city not liable where no notice of defect).

⁵³ Md. Code, Art. 75, Sec. 38; see: *The Law of Negligence as Applied to Municipal Corporations*, by Edwin J. Wolf, Daily Record, April 21, 1933.

⁵⁴ *Kennedy v. M. and C. C. Cumberland*, 65 Md. 514, 521, 9 A. 234, 57 Am. Rep. 346 (1886).

⁵⁵ *Irwin v. Sprigg*, 6 Gill 200, 46 Am. Dec. 667 (1847); *Knight v. Balto.*, 97 Md. 647, 55 A. 388 (1903); *Duross v. Balto.*, 136 Md. 56, 110 A. 98 (1920); *Burns v. Balto.*, 138 Md. 582, 115 A. 111 (1921); *Balto. v. Bassett*, 132 Md. 427, 104 A. 39 (1918); *Miller v. Balto.*, 161 Md. 312, 157 A. 289 (1931); *Balto. v. Poe*, 161 Md. 334, 156 A. 888 (1931); *Balto. v. Grossfield*, 173 Md. 197, 195 A. 554 (1938).

⁵⁶ *Annapolis v. Stallings*, 125 Md. 343, 93 A. 974 (1915).

claim for injury;⁵⁷ it must provide barriers, signals or warnings where the place might be dangerous; the test of danger is not the distance of the dangerous object or place from the highway but whether the reasonably prudent man would be subjected to such imminent danger that a barrier is needed to insure safety;⁵⁸ it must take steps to warn travellers of obstructions which might not be seen under reasonably foreseeable weather conditions, as by providing proper lighting;⁵⁹ but a traveller cannot recover for injuries sustained as a result of conditions encountered beyond the limits of the highway.⁶⁰

At this point it is appropriate to consider a peculiar circumstance with regard to the Police Department in Baltimore City, that is, "inasmuch as the police department of the City is controlled by a Commission (now Commissioner) appointed by the Governor of the State, and operating independently of the municipal government, the City is not liable for damages on account of the non-enforcement of its police regulations except in cases where its own conduct has produced the conditions which caused the injury."⁶¹ In *Altwater v. Baltimore*,⁶² it was held that the City was not liable to a pedestrian who had been injured by a speeding sled as it had no control over the Police Commissioners in exclusive charge of the nuisance complained of. In *Sinclair v. Baltimore*,⁶³ the City's non-liability was upheld for the same reason and injuries resulting from collision with building materials left in front of a building in the course of erection went uncompensated. Similarly, in *Taxi-Cab Company v. Baltimore*,⁶⁴ and in *Gutowski v. Baltimore*,⁶⁵ the City escaped liability because its Police Department was under State control.

⁵⁷ *Hagerstown v. Crawl*, 128 Md. 556, 97 A. 544 (1916).

⁵⁸ *Balto. v. State*, use of Cirtout, 146 Md. 440, 126 A. 130 (1924).

⁵⁹ *Balto. v. Thompson*, 171 Md. 460, 189 A. 822 (1937); *Balto. v. Beck*, 96 Md. 183, 53 A. 976 (1903).

⁶⁰ *Birkhead v. Balto.*, 197 A. 615 (Md. 1938).

⁶¹ *Gutowski v. Balto.*, 127 Md. 502, 505, 96 A. 630 (1916); see: Charter of Balto. City (1927), Sec. 740, providing for the appointment by the Governor of a Police Commissioner, who has supplanted the Commission referred to, and subsequent sections giving the Commissioner full control over the department. See also: Sec. 6, sub-section 18, wherein the independence of the Police Commissioner from the Mayor and other municipal officers is asserted; and Sec. 744 which places the duty to "prevent and remove nuisances from all the streets and highways . . ." on the Commissioner.

⁶² 31 Md. 462, 465 (1869).

⁶³ 59 Md. 592 (1883).

⁶⁴ 118 Md. 359, 84 A. 548 (1912) (taxi damaged by collision with building materials in street).

⁶⁵ 127 Md. 502, 96 A. 630 (1916): In this case the negligence complained of was the city's failure to enforce an ordinance which prohibited the use

Another line of cases illustrates those instances wherein "the city is 'instrumental in creating the occasion for the obstruction complained of' or takes part in making or causing it."⁶⁶ In such cases Baltimore City occupies "the same position as other cities and towns in the State would be in for injuries sustained by reason of such alleged defects."⁶⁷ Consequently, liability has been imposed where the injury arose through the negligence of a contractor, employed by the city, who created the condition causing the mishap.⁶⁸ Likewise, in *Baltimore v. Beck*,⁶⁹ the City was held responsible for injuries resulting from insufficient lighting at a place where construction materials were lying; in *Baltimore v. Walker*,⁷⁰ for injuries sustained from falling over a stop-box which projected two or three inches from the pavement; in *McCarthy v. Clarke*,⁷¹ where a pedestrian fell over a manhole frame left on the pavement; in *Baltimore v. Leonard*,⁷²; and in *Cordish v. Bloom*,⁷³ where the plaintiff caught his foot in a cellar door located in the sidewalk. Baltimore City is similarly responsible for other types of nuisances⁷⁴ and in a proper case injunctive relief will be given⁷⁵; all other municipalities of the

of iron hooks in loading a vessel with dynamite. It was conceded that the accident occurred without the corporate limits of the city but it was alleged to have happened within the jurisdiction and control of the municipality. The Police Commissioners were charged with the duty of enforcing municipal ordinances so the city was not liable. Among other reasons for denying the plaintiff recovery, the court says, 127 Md. 507: "The exercise by the city of its authority to provide for the safety of persons or property, where its corporate or proprietary interests do not require such action, is a governmental function for the non-performance of which it cannot be sued, unless such right of action is given by statute."

⁶⁶ *Cordish v. Bloom*, 138 Md. 8, 81, 113 A. 578 (1921).

⁶⁷ *Ibid.*

⁶⁸ *Balto. v. O'Donnell*, 53 Md. 110 (1879) (contractor stretched a rope across a street which was being repaired to prevent travel thereon. Plaintiff ran into it at night.).

⁶⁹ 96 Md. 183, 53 A. 976 (1903).

⁷⁰ 98 Md. 637, 57 A. 4 (1904).

⁷¹ 115 Md. 454, 81 A. 12 (1911).

⁷² 129 Md. 621, 99 A. 891 (1917); see: *supra* note 45.

⁷³ 138 Md. 81, 113 A. 578 (1921).

⁷⁴ *Balto. v. Merryman*, 86 Md. 584, 39 A. 98 (1898) (land overflowed by obstructions in stream); *Taylor v. Balto.*, 130 Md. 133, 99 A. 900, L. R. A. 1917 C 1046 (offensive odors—sewage disposal plant); *Balto. v. Sackett*, 135 Md. 56, 67 A. 557, 5 A. L. R. 915 (1919) (garbage reduction plant); see also: Charter and Public Local Laws of Balto. City (1927), Sec. 6, subs. 9 and cases there listed.

⁷⁵ *Balto. v. Fairfield Improvement Co.*, 87 Md. 352, 360, 39 A. 1081 (1898) (leper placed on former hospital site); *Block v. Balto.*, 149 Md. 39, 129 A. 887 (1925) (stench and fly nuisance); *Balto. v. Board of Health*, 139 Md. 211, 115 A. 43 (1921) (garbage disposal); *Livezey v. Town of Bel Air*, 199 A. 838 (Md. 1938).

state are, of course, similarly responsible for nuisances caused by themselves or other agencies.⁷⁶

Waterworks and Sewers

Maryland is in accord with the majority in holding that supplying water for the purpose of extinguishing fires is a governmental function. "... a municipal corporation, in maintaining waterworks, not only sells water to its inhabitants for domestic purposes, in the performance of which function it is practically always held to be acting in a private corporate capacity and for its own benefit, but also gratuitously furnishes water to be used in extinguishing fires, in the performance of which duty it is acting in a public governmental capacity."⁷⁷ In the former case, therefore, tort liability arises, in the latter it does not.

The municipality is likewise responsible for the proper construction and maintenance of sewers.⁷⁸ But, it is said, recovery against the city is difficult in cases of breaks in the water-mains or sewers: "Before one may recover for damages sustained either to the person or the property, by reason of a break in either of the two systems, it must be shown that the system was either defectively constructed, or that after being apprised of the break in the system, there was negligence in repairing the same."⁷⁹ The same rules of notice, and negligence are applicable here as in the highway cases.

Miscellaneous

There is but little Maryland law on the subject of tort liability for injuries sustained on municipal wharfs, piers,

⁷⁶ *Taylor v. Cumberland*, 64 Md. 68, 20 A. 1027 (1885) (coasting on street); *Cochrane v. Frostburg*, 81 Md. 54, 31 A. 703 (1895) (cattle running at large on street); *Hagerstown v. Klotz*, 93 Md. 437, 49 A. 836 (1901) (bicycles propelled at excessive speed); *Havre de Grace v. Fletcher*, 112 Md. 562, 77 A. 114 (1910) (pedestrian injured by falling of stack of beer kegs which had been allowed to remain adjacent to a footway).

⁷⁷ *Wallace v. Baltimore*, 123 Md. 638, 642, 91 A. 687 (1914); see also: 62 A. L. R. 1205, 1221; 54 A. L. R. 1497; 28 A. L. R. 822; 24 A. L. R. 545. In *Merryman v. Balto.*, 153 Md. 419, 138 A. 324 (1927) it was held that the city was liable for loss of rent due to failure of collector of water rents to install pipes and supply water to the premises within a reasonable time after acceptance of application.

⁷⁸ *Hitchins v. Frostburg*, 68 Md. 100, 11 A. 826, 16 Am. St. R. 422 (1887); *Frostburg v. Hitchins Bros.*, 70 Md. 56, 16 A. 380 (1888); *Frostburg v. Dufty*, 70 Md. 47, 16 A. 642 (1889); *Balto. v. Schnitker*, 84 Md. 34, 34 A. 1132 (1896); *Kurrie v. Balto.*, 113 Md. 63, 77 A. 373 (1910); *Kranz v. Balto.*, 64 Md. 491, 2 A. 908 (1886).

⁷⁹ *Edwin J. Wolf*, op. cit. *supra* note 53.

and docks. In *Baltimore v. De Palma*,⁸⁰ the city owned a pier which it devoted to the exclusive use of lumber merchants and persons having business with them. Boys had been repeatedly driven off and arrested for going thereon. The ten year old plaintiff, who was injured on the pier was not allowed to recover. The plaintiff contended the pier was a public highway, but the Court said that even if this assumption were indulged in, the particular pier in question was not such, as it was not open to the public generally. The Court also held the doctrine of attractive nuisance inapplicable. The latter doctrine, although recognized by our Court of Appeals, has not, so far, had a proper case for its application.⁸¹

There is no liability on the city for an *ultra vires* tort: "If the act was void because *ultra vires*, and they (Mayor and City Council) had no power to authorize it before it was undertaken and commenced, they certainly had no power to adopt it after it was done."⁸²

A Maryland statute places liability on cities and counties for the destruction of property by rioters or mobs. Relief has been given injured persons under these sections.⁸³ Responsibility is limited, however, as it is "the intention of this article that no such liability shall devolve on such county, town or city, unless the authorities having notice have also the ability of themselves, or with their own citizens, to prevent said injury."⁸⁴

⁸⁰ 137 Md. 179, 112 A. 277 (1920); see also: 19 R. C. L., p. 1134; and *Baltimore v. Steam Packet Co.*, 164 Md. 284, 292, 164 A. 878 (1932) where, in a case involving the interpretation of a grant of exclusive use of the pier, by ordinance, to the defendant company, the court said: "The ordinary piers belonging to the City are in a material respect unlike the streets and other property to be maintained for the general public use. Held in what has been distinguished as the private ownership of the City, they are available to be given over into exclusive private use, for the purpose of raising revenue."

⁸¹ *Grube v. Balto.*, 132 Md. 355, 361, 103 A. 948 (1918) (boy injured by electric current after climbing pole in schoolyard); see also: *State, use of Lease, v. Bealmear*, 149 Md. 10, 130 A. 66 (1925); *State, use of Potter, v. Longeley*, 161 Md. 563, 158 A. 6 (1930); see also: 36 A. L. R. 84, 139, 213; 39 A. L. R. 486; 45 A. L. R. 982; 53 A. L. R. 1344; 60 A. L. R. 1444; 20 R. C. L. 79; and see: *Attractive Nuisances in the Supreme Court of the U. S. and the Court of Appeals of Maryland*, by E. Paul Fody, *The Daily Record*, Sept. 27, 1938.

⁸² *Horn v. Balto.*, 30 Md. 218, 224 (1869) (unauthorized grading); *Valentine v. Road Directors*, 146 Md. 199, 126 A. 147 (1924) (Allegheny County Commissioners maintained defective bridge in Pennsylvania).

⁸³ Md. Code, Art. 82, Secs. 1, 2, 3, 4.

⁸⁴ *Balto. v. Poultney and Trimble*, 25 Md. 107 (1866); *Hagerstown v. Dechert*, 32 Md. 369 (1869); *Hagerstown v. Sehner*, 37 Md. 180 (1872).

⁸⁵ Md. Code, Art. 82, Sec. 2.

CONCLUSION

Municipal governments (and state and federal governments as well) are not entities existing separate and apart from the communities for whose service they have been established. Governments are methods whereby people regulate their own societal action so that each may live in some degree of comfort and security with the others. Such purpose is not achieved when an individual member of the community, himself without fault, is made to bear the entire cost of the injury done him by a servant of the community. But so long as the distinction between governmental and proprietary functions is maintained, legislative action is the only method by which municipal immunity may be abolished. Such method is, more often than not, a difficult and interminable undertaking.⁸⁵ "But however unjustified the premise of sovereign irresponsibility, it has stood rather stubbornly, even if not impregnably, in the way of statutory reform designed to overcome the injustice of these superannuated judicial doctrines . . . (which have) . . . by dint of iteration and reiteration acquired something of the sacred character of articles of faith."⁸⁶ Another writer says: "The whole doctrine of governmental immunity from liability for torts rests upon a rotten foundation."⁸⁷ Such structural weakness requires rebuilding.

Some of the difficulties that will attend the legislators' efforts are pointed out in the American Bar Association Journal.⁸⁸ They are of substantive, procedural, political and financial natures: "Some risks life in an organized community necessarily imposes. Certain types of activity falling more closely within the legislative or judicial function must be exempted from liability. Small communities also would vote against an enlargement of community liability, on the ground that a single accident might cripple them financially. Shall the liability be confined only to municipalities having large populations, or shall the smaller unit be brought in by distribution of the risk between the unit and the state? Shall the system of insurance, either of

⁸⁵ The Federal Government has, for over a decade, had under consideration a comprehensive Federal Tort Claims Bill. See: Borchard, *Recent Statutory Developments in Municipal Liability in Tort*, 2 Legal Notes on Local Government, Sept., 1936, 89-100.

⁸⁶ Borchard, *State and Municipal Liability in Tort—Proposed Statutory Reform*, 20 A. B. A. J. 747 (1934).

⁸⁷ Annotation, 75 A. L. R. 1196.

⁸⁸ Borchard, op. cit. *supra* note 86.

public officers with government defense of suits against them, or of direct public liability insurance for torts be adopted?"⁸⁹

The movement for statutory reform is not altogether uninitiated and strides have been made in several states, notably in New York,⁹⁰ California,⁹¹ Minnesota,⁹² Wisconsin,⁹³ and Ohio⁹⁴. It is hoped that Maryland will join the ranks of these who are attempting to diminish the "lordly prerogative of wrongdoing."⁹⁵

⁸⁹ *Ibid*, p. 750; appended thereto is a "Tentative draft of a possible state act for the settlement of claims against the State of and its political subdivisions on account of property damage, personal injury, or death." Doubtlessly, some parts thereof might commend themselves to the attention of our legislators. Professor Borchard, in the article cited *supra* note 85, refers to the New York statute as one which has proved "economical and efficient".

⁹⁰ Ch. 467, Laws 1929.

⁹¹ Gen. Laws of Cal. (Deering) (1931). Acts 5149, 5150. (Municipal liability for injuries to person or property received in highways, buildings, parks, grounds, etc.)

⁹² Minn. Stat. (Mason, 1936 Supp.) Secs. 1920-1, 1920-2, authorizing towns and school districts having an assessed valuation over \$2,000,000 to carry insurance against liability of employees of any department, and to defend suit and pay claims arising from injuries caused by negligent operation of motor vehicles.

⁹³ Wis. Stat. (1937) 66.095 at p. 913. (Liability for injuries by municipally owned and operated motor vehicles. This statute was upheld in *Shumacher v. Milwaukee*, 209 Wis. 43, 243 N. W. 756, 757 (1932) where the court says: "If municipal business was not intended to include all business transacted in the performance of a governmental function then the section amounts to nothing" because the city was already liable in its proprietary capacity. The injury had been caused by a fire truck.)

⁹⁴ Page's Annotated Ohio General Code, Perm. Supp. 1935, Sec. 3714.

⁹⁵ Maguire, *State Liability for Tort* (1916), 30 H. L. R. 20, 37. The Maryland Workmen's Compensation Act recognizes, at least in one situation, that sovereign immunity is inconsistent with present day social needs. Md. Code Supp. Art. 101, §35 provides: "Whenever the State, County, City or any municipality shall engage in any extra-hazardous work, within the meaning of this Article, whether for pecuniary gain or otherwise, in which workmen are employed for wages, this Article shall be applicable thereto." Section 32 lists the various types of extra-hazardous employments.